BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION

IN THE MATTER OF:	)	
	)	
[redacted]	)	NO.: 03-12
	)	
	)	DUE PROCESS HEARING

FINAL ORDER

Jack E. Seaman
Administrative Law Judge
611 Commerce Street. Suite 2704
Nashville, Tennessee 37203
615/255-0033
Prof. Resp. No. 4058
March 17, 2004

FINAL ORDER

Case No. 03-12

This case involves a student with disabilities who had attained the age of thirteen years at the time of the hearing in August 2003. He had attended this school system for several years and there had been multiple IEP meetings and IEPs which had been developed. The parents were both highly educated, had participated in the IEP team meetings and had been in communication with school personnel on an ongoing basis. The student's activities and progress were frequently subjects of discussion and other communications. The student was generally mainstreamed for education. At an IEP team meeting in May of 2002 placement of the student in a self-contained classroom for students with disabilities for a period of the day was discussed and it was decided that it should be further considered after school started in the fall. In the beginning of the sixth grade school year at an August 16, 2002 IEP team meeting there was a review of the issue of the student being in a self-contained classroom part of the day. It was then determined that the student would be placed in the self-contained classroom for two hours a day and would be with a one-to-one aide during that time period. Testimony of the parents indicated that they were not pleased with the placement but had signed the IEP, in part, because the school leader had said that they could change the IEP if they had to. However, the child never attended the self-contained classroom probably because the parents kept the child out of school until an August 23, 2002 IEP team meeting when the parents asked for a half day schooling program because the parents were going to be

providing private services, or home schooling, for the student. Sometime after the August 16th IEP meeting, and before the parents requested an IEP team meeting which was set September 18th, the parents decided to remove the child from the school system.

At the September 18, 2002 IEP meeting the parents delivered a written statement to the IEP team providing that the parents rejected "the special educational program provided by the . . . School District for the school year 2002-2003", stated that the parents would "obtain private services for the stated school year" and requested two specific evaluations and occupational therapy which the parents stated they expected the school district to pay for. The parents then left the meeting and the IEP team went forward with the meeting and developed an IEP on that date. Following the September 18th IEP team meeting a school system representative sent a letter dated September 18, 2002 to the parents acknowledging that the parents had withdrawn the student from the school system and enrolled him as a home school student; however, the school system was providing the proposed IEP program and requested the parents to contact the special education services if it could be of further service to the parents. The letter was sent by certified mail and the parents refused to accept it. Approximately eight months later a request for due process hearing was filed. The due process hearing request and proceeding has not specifically addressed the reasons why the IEP was rejected, any specific request for a placement of the student or the requested evaluations.

The removal of the student from the school system was because the parents had decided to home school the student and since the student has been removed the school system the parents have home schooled the student and obtained periodic tutoring for math and reading and have had some services for behavior. The parents had declined

the offer at the May 2002 IEP team meeting for extended school year services for the child during the summer of 2002 because they believed the hassle of attending outweighed the benefits. The parents obtained evaluations of the student during 2002 which they did not provide the school system for consideration in developing or reconsidering any IEPs. The parents began home schooling for half day with the student still being in the public school system and then decided to remove him from the public school system and home school him.

Although home schooling is certainly not the least restrictive placement, it appears that the parents are satisfied with the education of their child and, fortunately for the child and the parents, because of the parents' educational background, their abilities, desires, and resources, they can provide the child with educational benefit and a meaningful parent/child relationship by devoting the time necessary to provide home schooling for the child.

Home schooling is an option for parents of a child and is an alternative to mandatory attendance in a public school. TCA § 49-6-3050 (a)(1); Rust v. Rust, 864 S.W. 2d. 52 (Tenn. App. 1993). It has been recognized in Tennessee that child-raising is beyond the competence of impersonal political institutions and that parents have a right to raise children as they see fit. Id. and authorities cited therein. See *In re* Knott, 197 S.W. 2d. 1097, 1098 (Tenn. 1917); State ex.rel. Bethell v. Kilvington, 45 S.W. 433, 435 (Tenn. 1898). In the instant case the parents removed the child from the public school system after deciding to home school their child, told the school system they did not want an IEP to be developed and refused to accept correspondence from the school system. It is not believed that there is an individual IDEA right to free appropriate public education for a

child whose parents legally removed him from the public school system and home school him. See, e.g., 34 CFR § 300.454 (a).

Issues

During the time from the filing of the request for due process and the beginning of the due process hearing, much time and effort was devoted to determine what issues were to be considered and decided in the course of the due process hearing. The issues determined for consideration are whether the parents and student were entitled to compensatory education and whether the parents were entitled to reimbursement for the costs of certain services that had been provided at the parents' expense, allegedly because the school system would not provide them. Interestingly, during the course of the hearing there was testimony that the parents had filed the request for due process hearing to try to figure out, or find out, what had been going on at the school system and to see if the school system could be ordered to pay for some unspecified and unknown educational placement.

The questions for determination are whether the parents and student are entitled to compensatory education and, also, whether the parents are entitled to reimbursement for the costs of services that the parents obtained for the child, allegedly because the school system would not.

The parents' position is that the school system never provided an appropriate IEP and never provided the services that the IEPs called for.

The school system's position is that it provided appropriate special education for the child in that appropriate IEPs were developed which were reasonably calculated to

enable the child to receive educational benefits and that the child did receive educational benefits. The school system also takes the position that under the applicable law the student/parents have the burden of proving that the IEPs which were developed were not appropriate before making a claim for compensatory education and reimbursement and the school system maintains that the burden has not been met by the proof offered.

Discussion

The U.S. Supreme Court has stated "the primary responsibility for formulating the education to be accorded a handicap child, and for choosing the educational method most suitable to the child's needs, was left by the Act [IDEA] to state and local educational agencies in cooperation with the parents or guardian of the child." Board of Education v. Rowley, 458 U.S. 176, 207, 73 L. Ed. 2d. 690, 712 (U.S. 1982). School systems must provide individualized education to enable the student to obtain educational benefit, achieve passing grades, and advance from grade to grade; but, are not required to provide the best possible education for children with disabilities under IDEA. Board of Education v. Rowley, supra. See Doe v. Board of Education of Tullahoma City Schools, 9 F. 3d. 455 (6th Cir. 1993); Springdale School District v. Grace, 693 F. 2d. 41 (8th Cir 1982); cert. denied 461 U.S. 927 (1983). The educational benefits do not have to maximize a child's potential, but must only offer a "basic floor of opportunity" which will allow the child to progress with his education. Board of Education v. Rowley, 458 U.S. 73 L. Ed. 2d. at 708, 102 S. Ct. at 3048 (U.S. 1982).

The reported decision in Berger v. Medina City School District, 348 F.3d. 513 (6th Cir. 2003), was brought to the attention of the Administrative Law Judge by counsel for

the school district following the filing of briefs because it was believed to be a relevant decision and had just been decided. Counsel for the parents/student objected to the notification of the recent decision and the school system attorney responded by citing a Procedural Rule which permitted the notification. The decision in Berger v. Medina City School District is believed to be relevant to several legal considerations in the instant case. The decision provides that a court is empowered to "reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act [IDEA]." Id. at 519. (Authority omitted) It provides that when parents unilaterally change a student's placement during review proceedings and without consent of the state or school, in that situation the parents are entitled to reimbursement only if it is determined that the public school placement violated IDEA when the private school placement is proper under IDEA. Id. 519-20. (Authority omitted) The court addresses the standard Rowley directions for evaluating an IEP/public placement as being first, whether the state or school district has complied with the procedural provisions of IDEA and second, whether the IEP developed by the state or school is reasonably calculated to enable the child to receive educational benefits. Id. 520, Citing Board of Education v. Rowley, 458 U.S. 178, 206-207 (1982). The court also notes that procedural violations "will constitute a denial of a FAPE only if it causes substantive harm to the child or his parents; such as seriously infringing on the parents' opportunity to participate in the IEP process, depriving an eligible student of an IEP, or causing the loss of educational opportunity. Id. at 520 (Authority omitted)

Since the parents were challenging the Individual Educational Plan (IEP), the burden of proof was on the parents to prove by preponderance of evidence that the IEP, or any IEP that was challenged, violated the Individuals with Disabilities Education Act (IDEA) and did not provide the student with a Free Appropriate Public Education (FAPE). McLaughlin v. Old Public Schools Board of Education, 320 F. 3d. 663 (6th Cir. 2003). Brenner v. Board of Education, 185 F. 3d. 635, 642 (6th Cir. 1999). If parents were seeking reimbursement for educational expenses and related services under IDEA and, in particular, placement in a private facility, parents would not meet the burden of proof merely by proving that the private facility provided the student with superior services. Doe v. Board of Education, 9 F. 3d. 455, 459 (6th Cir. 1993), cert. denied. 511 U.S. 1108 (1994). Parents would first be required to prove that the public school was "unable to provide [their] child with an appropriate education." Gillette v. Fairland Board of Education, 932 F. 2d 551, 554 (6th Cir. 1991).

Even when a procedural violation is determined to be established it does not mean that parents and/or student are entitled to relief. Only if a procedural violation resulted in substantial harm in that it seriously infringed upon the parents' opportunity to participate in the IEP process and thereby denied the student's right to a free appropriate public education would it be appropriate to grant any requested relief to the parents/student. Kings Local School District v. Zelazny, 325 F.3d 724, 732 (6th Cir. 2003) and authorities cited therein.

The Due Process Hearing was conducted on four separate days during which testimony was presented through eighteen witnesses and a multitude of documents

were admitted as exhibits. The witnesses who testified during the course of the hearing all had personal knowledge of this student. The witnesses included the parents of the students, two tutors who had been working with the student and parents during the course of home schooling and had no opinion as to the school system IEPs, etc., the director of special education at the school system, educational specialists from the school system, regular education teachers, special education teachers, aides and assistants for this child during the school program, speech language pathologist, two persons involved with occupational therapy, and a clinical psychologist who the parents had retained to treat the child for severe behavior disorder.

The preponderance of evidence is that the goals and objectives of the IEPs were abundantly clear and understood even though they could have been better written. There was no expert witness who testified that the IEPs were not procedurally appropriate or did not provide a reasonable educational program for the student. The testimony and opinions of the witnesses were predominantly favorable to the school system. At the various IEP meetings all matters were explained and discussed. The various school personnel and the parents communicated and discussed the activities and progress of the student throughout his time in school and there were written notes, reports, and records prepared and/or exchanged from time to time. The various IEP meetings and the IEPs that were developed involved consideration of various issues from time to time. The number of IEP meetings for this student exceeded the average number of meetings for a special education student and it is abundantly clear that this student received individual consideration. The testimony and evidence regarding the Collaborative Method used by the school system, and how it was used involving this

individual student and the testimony of the various school personnel, establishes that this student received individual consideration and assistance and did make educational progress.

The psychologist providing treatment for behavior first saw the student on April 29, 2001 due to oppositional behavior because the child was oppositional with his mom and dad. The psychologist's notes in June of 2001 indicate that the child was "doing well in school." The testimony of the psychologist indicated that the child had gradually progressed over one and a half to two years and that his social behavior and his social language had improved. The psychologist attributed the improvement to the child's mom and dad and their efforts. A complete reading of the psychologist's notes, which were not made an exhibit because the parents did not want the school system to have access to all of the notes and, thereby, agreed not to pursue reimbursement for any expenses or treatment related to the psychologist, together with the notes that were disclosed and the testimony of the psychologist, clearly indicate that the behavior problems could be attributed to home and family issues and that the efforts of the parents could also be credited as the reason for the improvement.

The lawsuit/request for due process hearing was filed in May of 2003 for the testified to purpose to get answers and accountability as to what had happened at the school system because the parents believed they had seen more potential in the last year than they had seen before. The parents said that they would not reenroll the student in the school district and would not have him educated in that school district; however, if it was determined that the school system would pay for enrollment in a private placement, the

parents would allow the school system to pay for the education. The mother did compare returning the student to this school system as being like returning to a malpractice doctor who had cut off your wrong foot and you would not want to go back to that doctor and take a chance of him cutting off the other foot. However, this is not a case where the issues and evidence concern whether the school system could not provide appropriate education and, if not, whether a selected private placement offered adequate and appropriate education under IDEA. This is a case where the parents decided to remove their child from public school and home school him without special education as provided for under the provisions of IDEA.

Findings of Fact and Conclusions of Law

Based upon the evidence presented in this proceeding and the applicable law, it is found that the evidence preponderates as follows:

1. The IEPs in question were developed through the IDEA's procedures and were reasonably calculated to enable the student to receive educational benefits.

2. The school system complied with its obligation to provide FAPE in terms of good faith implementation of the IEPs and reasonable formulation of IEPs.

3. The parents had meaningful participation in the IEP process.

4. There were no procedural violations that resulted in substantial harm by seriously infringing upon the parents' opportunity to participate in the IEP process or denying the student's right to FAPE.

5. If the parents decided to home school this student because, as parents, they wanted to home school their child, there are no legal questions which need to be answered based upon the evidence presented. However, if the ultimate decision was how to provide the child with the best educational resources available under the IDEA, the actions taken by the parents are unreasonable. 20 USC 1412 (a)(10)(iii)(III).

6. As an equitable matter, the parents are not entitled to compensatory education in any form or any requested reimbursement.

7. The IEPs in question do not all fully comply with all the procedural requirements for specific information to be expressly set forth in each IEP and, as acknowledged by the testimony of the Director of Special Education, the IEPS could have been better prepared with more specific information; however, the evidence of record supports the Director's opinion that any such procedural violation did not serve as a barrier to the parents' participation and did not harm the educational program of the student. Therefore, the motion for findings and conclusions pursuant to T.R.C.P. 52.01 does not require a specific finding as to each and every one of the multitude of alleged procedural violations because the findings herein cover all the relevant facts necessary to resolve this case.

8. Based upon all the evidence presented in this proceeding, and based upon seeing and hearing the various witnesses who testified, it is found that the parents and the appropriate school personnel appropriately participated in the IEP team meetings and in developing an appropriate IEP for the student and that the school personnel and the parents or parent had ongoing communication regarding the student, all to the extent that the parents and school personnel were involved in the IEP process as contemplated by

IDEA. Although it appears that all of the procedures for development of IEPs as provided in IDEA were not always completely complied with, the evidence does not preponderate in support of a finding that any procedural violation resulted in substantial harm by severely infringing upon the parents' opportunity to participate in the IEP process and/or denying the student the right to a Free Appropriate Public Education.

9. With regard to concerns raised during the Due Process Hearing about staff selection, teaching reading methodology, and placement in a self contained classroom for a portion of the day, although these are not determinative issues in this proceeding, staff selection and methodology were matters properly determined within the authority of the school system and the IEP plan for two hours a day in a self contained classroom was appropriately determined and the IEP provided for a less restrictive educational program than home schooling selected by the parents.

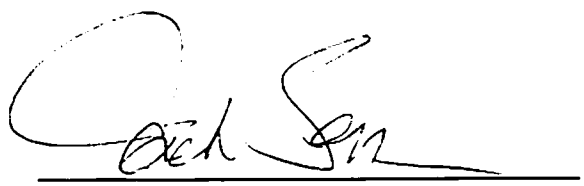
10. The entire proceedings in this matter reveal a situation which is sometimes present in a contested special education proceeding. Unlike the goal of IDEA for the student to be the focal point and for the school system and the parents to work together for the benefit of the student, the primary difficulty appearing in this proceeding is an apparent personal conflict/disagreement between the parents and the school system which has prevented their working together for the benefit of the child. One additional indication of this is the mother's complaint because she had apparently tried to be in school with the student in various classes and had been asked, or told, to leave by at least several teachers. When the parents could have gone forward with IEP meetings and addressed their concerns, they chose to remove the school system from the education of their child.

11. The parents have the right to continue home schooling their child if they desire to do so; however, if they desire the child to receive IDEA benefits through a public school system and, because of the personal relationship with the current local school system they will not return their child to that system, they may relocate their residence as many people do to select a school system in which they prefer to enroll their child.

CONCLUSION

Based upon the evidence presented, the applicable law, and the findings of the administrative law judge, it is hereby, ordered that the parents are not entitled to the relief sought.

Entered this 17 day of May, 2004.



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